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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY
and
THE MONTANA POWER COMPANY, ET AL.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE
MONTANA PUBLIC SERVICE COMMISSION
IN SUPPORT OF PETITIONERS

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MOTION OF THE MONTANA PUBLIC SERVICE
COMMISSION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Montana Public Service Commission
respectfully requests leave to file the
accompanying brief amicus curiae in support

of the petition for a writ of certiorari, filed in this case by Utah Power & Light Company ("Utah Power") and The Montana Power Company ("Montana Power"). The Montana Public Service Commission at its meeting on March 7, 1983 in Helena, Montana approved the filing of an amicus brief in support of petitioners. Written consent from Montana Power has been received and the consent of the Solicitor General and Utah Power will be filed directly with the Clerk of the United States Supreme Court.

The Montana Public Service Commission's interest in this case arises from its statutory duty in Montana to supervise, regulate and control public utilities such as Montana Power and its corresponding authority to assure the best use of Montana's natural resources to provide inexpensive hydroelectric power to the citizens and ratepayers of Montana.

On June 27, 1980, the Federal Energy Regulatory Commission ("FERC") issued an "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings," 11 F.E.R.C. (CCH) ¶61,337 ("Opinion 88"), threatening to eliminate the Montana ratepayers' access to inexpensive hydroelectric power. As a result, a limited number of fortunately situated municipalities will be allowed to "acquire" the hydroelectric facilities at a cost far below fair market value. The inexpensive power produced from these "acquired" facilities will then be available only to the acquiring municipality while all other Montana ratepayers will experience rate increases.

In its amicus brief the Montana Public Service Commission discusses the adverse impacts upon the citizens and ratepayers in Montana resulting from the decision in Alabama Power Co. v. F.E.R.C. 685 F.2d,

1311 (11th Cir. 1982) which affirmed the F.E.R.C. ruling, supra. The disastrous effects of splitting the hydroelectric facilities in Montana among separate municipalities both within and outside the State of Montana would create a situation where a relatively few ratepayers would benefit greatly from the possible acquisition of existing hydroelectric facilities at a cost far below their actual or market value and the majority of Montana ratepayers would be effectively deprived of the low-cost power from projects which they paid for through the years. The Montana Public Service Commission is in a position to provide information on the effect of municipal preference on the citizens and ratepayers of Montana and to represent their interests in this extremely important case.

The Montana Public Service Commission believes that the action of the Court below

in affirming Opinion 88 will adversely affect the general welfare of the people of Montana and of the nation for the benefit of a limited number of fortuitous municipalities. The Montana Commission considers the decisions below to be extremely significant in that they would discourage full maximazation of the nation's hydroelectric resources, dampen private investor interest in constructing, owning, or operating hydroelectric facilities, and have the net effect of raising consumers' electricity costs. The significance of the question of Federal law presented here is of primary relevance to the court's consideration of the petition for a writ of certiorari, and the full importance of that question can be appreciated only if the Court is completely aware of the impact on the ratepayers resulting from the decisions below.

The Montana Commission due to its unique regulatory and public interest perspective,

believes that it can provide this Court with valuable insight into the consequences of this case, and a more complete understanding of what is at stake in this litigation.

Respectfully submitted,

THE MONTANA PUBLIC SERVICE
COMMISSION

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March 9, 1983

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AMICUS CURIAE BRIEF OF THE MONTANA
PUBLIC SERVICE COMMISSION IN SUPPORT OF
PETITIONERS

STATEMENT OF THE CASE

This controversy involves the interpretation of the scope of the statutory preference granted to municipalities under Part I of the Federal Power Act in licensing hydroelectric power projects. The petition for certiorari filed by Utah Power & Light Co. ("Utah Power") and The Montana Power Company ("Montana Power") on February 4, 1983, contends that the Federal Power Act distinguishes between "original licensees" and "new licensees" and that the municipal preference does not apply in a relicensing proceeding against the "original licensee" applying for a license renewal. The Federal Energy Regulatory Commission ("FERC") interprets the term "new licensees" as used in §7(a) to include any applicant for a new license, including the "original licensee," and therefore intends to apply the municipal preference against both "new" and "original" licensees.

Federal Energy Regulatory Commission Opinion 88, "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings" (Opinion 88), issued June 27, 1980, 11 F.E.R.C. (CCH) ¶61,337 ("Opinion 88"). FERC's decision was affirmed by the United States Circuit Court of Appeals for the Eleventh Circuit on September 17, 1982, as reported at 685 F.2d 1311 (11th Cir. 1982). The Montana Public Service Commission ("Montana Commission") files this brief of amicus curiae in support of petitioners Utah Power and The Montana Power Company, with the consent of petitioners and respondent Federal Energy Regulatory Commission.

In Montana, a public utility is defined by statute as follows:

Section 69-3-101 M.C.A. Meaning of term 'Public Utility'. The term 'public utility', within the meaning of this chapter, shall embrace every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that

now or hereafter may own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal:

- (1) heat;
- (2) street-railway service;
- (3) light;
- (4) power in any form or by any agency;
- (5) except as provided in chapter 7, water for business, manufacturing, household use, or sewerage service, whether within the limits of municipalities, towns and villages or elsewhere;
- (6) telegraph or telephone service.

Pursuant to Section 69-3-102 M.C.A., the Montana Public Service Commission is given the authority to supervise and regulate public utilities:

69-3-102. Supervision and regulation of public utilities. The commission is hereby invested with full power of supervision, regulation, and control of such public utilities, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town, or village.

Because Federal Energy Regulatory Commission Opinion 88¹ will have substantial adverse economic impacts on customers of non-municipal utilities within Montana and on the State itself, the Montana Commission urges the Court to grant Utah Power's and Montana Power's petition for a writ of certiorari in this case.

Montana consumers of electric power are served by Montana Power, by cooperatively-owned utilities, and by Pacific Power & Light. Electric power needs in Montana are met through a combination of coal-fired, gas-fired and oil-fired thermal plants, hydroelectric projects and (primarily in the case of cooperatively-owned systems) by purchased power from Federally-owned hydroelectric projects. The least expensive sources of

¹City of Bountiful, Docket No. EL78-43 (June 27, 1980) 11 FERC (CCH) ¶61,337; aff. 685 F.2d 1311 (11th Cir. 1982).

electric energy for consumers in Montana are the hydroelectric projects, and among the least expensive sources of hydroelectric power are Montana Power's older projects which are presently subject to relicensing proceedings or which are scheduled to be relicensed by the FERC within the next twenty years. The 13 hydroelectric projects of Montana Power and their license expiration dates are:

<u>Name</u>	<u>(kW) Capacity</u>	<u>Project</u>	<u>License Expires</u>
Black Eagle	16,800	(2188)	12/01/1998
Cochrane	48,000	(2188)	12/01/1998
Hauser	17,000	(2188)	12/01/1998
Holter	38,400	(2188)	12/01/1998
Kerr	197,000	(#5)	05/23/1980
Morony	45,000	(2188)	12/01/1998
Mystic	10,000	(2301)	12/31/2009
Rainbow	35,600	(2188)	12/01/1998
Ryan	48,000	(2188)	12/01/1998
Thompson Falls	30,000	(1869)	12/31/2015
Flint Creek	1,100	(1473)	07/01/1988

<u>Name</u>	<u>Capacity</u>	<u>Project</u>	<u>License Expires</u>
Madison	9,000	(2188)	12/01/1998
Milltown	<u>3,040</u>	(2543)	12/31/1993
	499,940		

The Commission regulates Montana Power's retail sales in Montana of the electricity generated by these 499,940 kilowatts of inexpensive hydroelectric power capacity with a policy goal of assuring maximum benefit for all Montana ratepayers. Montana Power consumers' rates reflect the low cost power produced by these facilities. These projects were largely paid for by Montana ratepayers through inclusion in their rates of depreciation charges and return on Montana Power's original investment in these projects. The ratepayers of Montana Power have a substantial interest in seeing Montana Power maintain the inexpensive components of its power producing system. The Montana Commission takes the position that

Montana Power's ratepayers should continue to receive the benefits of these 13 projects which they have largely paid for over the last 60 years. The Commission's mandate to protect the public interest of all the customers of the electric utilities it regulates compels it to express its support for the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Montana Commission urges the Court to review the decision below because of the legal and practical consequences of that decision. The Montana Commission believes that the practical effects of the decision upon electric energy consumers, particularly in Montana, should be noted by the Court. This amicus curiae brief addresses the economic impacts and the unfairness of allowing a few unregulated municipalities to take over the hydroelectric facilities of a State-regulated utility to the detriment of a broader-based group of electric consumers.

ARGUMENT: REASONS FOR GRANTING THE WRIT

A. This Case Presents an Important
Question of Federal Law Which Should be
Settled by the Supreme Court

The Montana Commission believes that the petitioners' appeal is worthy of review by the Supreme Court because of the practical importance of the federal law questions incorporated in the appeal. In particular, the Montana Commission emphasizes that the appellate court's affirmation of FERC Opinion 88 has important practical consequences for consumers of electricity in almost every state. The impacts of Montana consumers are representative of the widespread effects of this decision. Investor-owned utilities licensed under Part I of the Federal Power Act serve approximately 43 million consumers.

1. Montana Power's Loss of the 13 Projects Will Reduce the Reliability of Montana Power's System

Montana Power operates an integrated system of power production, transmission and distribution. The integrated nature of a utility's operations provides important service benefits including system reliability and efficiency maximization. Montana Power's hydroelectric projects serve a unique and critical function within this integrated system by enhancing the reliability of Montana Power's overall system.

Utilities achieve reliability through use of individual components and subsystems which have been developed and tested to achieve low failure rates, and by providing multiple sources and paths for power supply so that no single equipment failure will cause service interruptions. Montana Power's

hydroelectric projects serve these reliability functions in two respects: First, those projects which have storage capacity can provide peaking power to meet any anticipated demands on Montana Power's systems. Second, Montana Power's hydroelectric facilities can provide an important "start up" capability for the entire Montana Power system following a system-wide service interruption. Should Montana Power lose its hydroelectric facilities through relicensing proceedings, Montana Power will be required to provide greater reliability by augmenting its system with diesel or gas turbine units at great expense to the Montana ratepayers and with a significant increase in consumption of oil or natural gas.

The electric utility business is a business sensitive to economies of scale. Fragmentation of an integrated system leads

to inefficiencies, duplication and waste when viewed on a regional scale.² Montana Power has experience and expertise in maintaining and operating its facilities, and a pool of personnel specifically trained to operate each particular hydroelectric project. Fragmentation will displace much of this expertise, adding to the inefficiency, waste and reliability losses of the entire regional system. It is the Commission's goal to eliminate inefficiency and waste in the interests of the Montana ratepayer.

²See Power Pooling in the United States, FERC-0049, Office of Electric Power Regulation, Federal Energy Regulatory Commission Report, December, 1981, p.2-5, 19. Although interconnection agreements among smaller utilities may help reduce in inefficiency of a fragmented system, these agreements have failed to recreate the service coordination and administrative efficiencies of a unified system. See Id. p. 39-50.

2. Opinion 88 Threatens to Deprive Montana Power's Ratepayers of Low Cost Power from Projects Largely Paid for by Those Ratepayers.

In the event that Montana Power's projects are transferred to "new licensees," compensation to Montana Power from the "new licensee" is limited to "net" investment plus severance damages. See §§ 14 and 15 of the Federal Power Act, as amended, 16 U.S.C. §§796(13) and 807(a)(1976). The "net" investment factor is based upon original cost less amortization over the years of operation. The remaining "net" investment at the time of relicensing, therefore, ignores the value of the facility for purposes of replacement or the increased cost of fuel to operate a replacement facility. Thus, the FERC anticipates that the compensation the "original licensee" would receive

could range from zero to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and would be considerably less than the cost of building or otherwise acquiring new generating capacity today.

FERC Opinion 88 at p. 4. The Montana Commission believes that Montana consumers would thus face these adverse impacts: (1) compensation for the loss of property at less than its fair value, (2) increased system-wide electric rates due to loss of inexpensive power, (3) the expense of constructing replacement capacity at inflated capital cost and (4) fuel costs.

B. The Court of Appeals Failed To Thoroughly Examine the FERC's Conclusion

Nothing in the language of the Act provides that original licensees are to be subject to a municipal preference in re-licensing proceedings. Instead, Section 7(a) of the statute limits application of the municipal preference by use of the phrase

"to new licensees;" and "new licensees" are all applicants other than an original licensee. There is no compelling legislative history or policy reason to read the statute as if it established a preference against original licensees. The opportunity for the governmental takeover of licensed projects is fully preserved without such preference by (1) opportunity for condemnation, expressly reserved by Section 14(a) of the Federal Power Act, 16 U.S.C. §807 (1976), (2) Federal takeover pursuant to Section 14, (3) a preference against "new licensees" in relicensing and (4) the opportunity to compete on an equal footing with original licensees in relicensing, under Section 7(a)'s "best adapted" standard. 16 U.S.C. §800(a) (1976).

The Court of Appeals failed to examine carefully the FERC's analysis in Opinion 88, it affirmed the result without seriously analyzing the reasoning and the materials

relied upon by the FERC. The FERC's position is inconsistent with the language and legislative history of the Act, as well as with the statutory policy of serving, first and foremost, the public interest in the use of limited and valuable hydroelectric power resources.

CONCLUSION

The Court should review this case because of the substantial interest of electric consumers in Montana and throughout the nation in the future allocation of benefits of low-cost hydroelectric power. The decision below provides important competitive advantages to municipal applicants competing with Montana Power and other investor-owned utilities for new licenses upon expiration of its original licenses. In Montana Power's case, those competitive advantages may ultimately result in the transfer of Montana Power's projects to municipal "new

licensees." In view of the substantial disruption to Montana Power's system and the manifest injustice which such a transfer would produce, this Court should grant certiorari in order to determine authoritatively whether Congress intended to establish a municipal preference against "original licensees."

Respectfully submitted,

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March 9, 1983

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the foregoing Motion for Leave to File Brief and Brief of Amicus Curiae of the Montana Public Service Commission has been served by mail, postage prepaid, upon all parties listed below as of this 9th day of March, 1983.

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